No. 91-969

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

MICHAEL H. ALLEN, Radioman, Senior Chief
United States Navy, Retired,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Military Appeals

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REPLY BRIEF FOR PETITIONER

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JURISDICTION

Respondent's brief in opposition to the petition for writ of certiorari correctly points out that the petition was filed on the ninety-first day after the lower court's final decision. However, this defect is not jurisdictional, and the Court may grant a waiver of its own rules. *Schacht v. United States*, 398 U.S. 58, 63-64 (1970). *See also Sanabria v. United States*, 437 U.S. 54, 62 n.12 (1978); Robert L. Stern, Eugene Gressman & Stephen M. Shapiro, *Supreme Court Practice* 306-10 (6th ed. 1986), and the cases cited therein. Petitioner is represented by counsel of record in California and by military counsel in Washington, D.C. Unfortunately, and through no fault of Michael Allen, the petition was filed twelve hours late. Petitioner respectfully requests that the Court waive its

time limit in this case in order to address the important issue presented by this case.

ARGUMENT

The very soul of the judicial process is its impartiality. Petitioner's issue presents the opportunity to create a window of analysis affording a deep look into that soul. Moreover, when the government deliberately tries to influence a judge, the analysis of prejudice should not focus solely on the degree of the government's success. Sufficient harm to Petitioner, and to the judicial system, arises from the wholly improper attempt by the government to influence the judge.

The fact that the government attempted to influence the judge makes this an important issue. As Chief Justice Sutherland pointed out:

> [The government is] not . . . an ordinary party to a controversy, but . . . a sovereign[] whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that *justice* shall be done.

Berger v. United States, 295 U.S. 78, 88 (1935) (emphasis added).

Respondent asserts that because the lower courts found no actual influence and prejudice to Petitioner that the question presented is fact-bound and unworthy of the Court's attention. Brief in Opposition at 9. However, the standard for impartiality in the judiciary is not a fact-bound issue, and clearly within the Court's purview. *Cf. Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988).[1]

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[1] Contrary to Respondent's assertion (brief in opposition at 8, n.7), *Liljeberg* applies to this case. Rule for Courts-Martial 902(a) requires disqualification of a military judge whenever his impartiality might reasonably be questioned. The rule's analysis, con-

Respondent's assertions that the lower courts found no harm is somewhat misleading. The Navy court observed that the trial judge (whose lenient sentence philosophy had been brought to the attention of senior leadership in his chain of command) "was not the same judge over whom the parties were arguing. He was tainted to the extent that his impartiality was placed into question as a result of his being a target of improper influence. . . ." Pet. App. 81b. Moreover, the Navy Court observed that these same senior members of the judge's chain of command might influence the decision to continue his assignment as a judge, or his next duty assignment. Pet. App. 81-82b, n.19. Therefore, although the lower courts concluded that the judge was impartial, that finding does not cleanse the taint on the trial or dispel the appearance of partiality presented by this case.

Improper influence on the judiciary is like fog; it is discernible, but not easy to grasp and describe. Thus, when a prima facie showing of influence is made, the burden shifts to Respondent to dispel the taint beyond a reasonable doubt. *United States v. Thomas*, 22 M.J. 388, 394 (C.M.A. 1986). This case presents the conflict between a judge's attempt to obey his oath of impartiality and the pressure to conform to his superiors' disdain for lenient sentences. The Court's earlier decisions have dealt primarily with prohibited statutory influences, such as a party's pecuniary influence. *See e.g., Liljeberg, supra*, 486 U.S. 847; *Tumey v. Ohio*, 273 U.S. 510 (1927). This case presents the opportunity to explore and define the salient factors affecting the appearance of justice. As the Court has observed: "justice must satisfy the appearance of justice . . . and this 'stringent rule may

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tained in the Manual for Courts-Martial, 1984, App. 21, states that it is based upon 28 U.S.C. § 455, which in turn is based on Canon III of the ABA Code of Judicial Conduct. Therefore, not only are the military and federal rules the same, but both are based upon the same Code of Conduct governing all judges. The issue is clearly of national importance.

sometimes bar trial by judges who would do their very best to weigh the scales of justice equally between the contending parties.'" *Marshall v. Jerrico Inc.*, 446 U.S. 238, 242-43 (1988).

Certainly no criminal defendant is entitled to a particular judge. Brief in Opposition at 7, *see Tumey v. Ohio*, 273 U.S. at 531-32. However all criminal defendants are entitled to a judge whose impartiality is free of substantial doubt. The Court should grant this petition to remedy the violation of Petitioner's fundamental right to a fair trial, to deter further illegal conduct, and to preserve judicial integrity.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, the Court should grant the writ.

Respectfully submitted,

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